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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 820

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, PETITIONER

vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Flight Engineers' International Association, AFL-CIO, CAL Chapter, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court below (Appendix A, *infra*, p. 21) is not yet reported officially or unofficially.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court below was entered on October 23, 1961. Petitioner filed a timely motion for rehearing en banc to the Court below which was denied December 7, 1961. By an Order dated March 2, 1962, this

Court extended the time for the filing of a petition for writ of certiorari in this cause to and including March 27, 1962.

Jurisdiction of the District Court was based primarily on 28 U.S.C. §§ 1331, 1337, and on 28 U.S.C. § 2201 et seq.

QUESTIONS PRESENTED

1. Does the duty of a Federal Court to enforce by appropriate decree the statutory scheme to promote collective bargaining and to protect the freedom of choice of bargaining representatives under the Railway Labor Act, 45 U.S.C. § 151, et seq., survive a course of conduct by a carrier, in violation of the Act, whereby said carrier succeeds, through bargaining with the individual employees, in obtaining a dissolution of the Union the employees had theretofore selected as their collective bargaining representative?

2. May a carrier subject to the Railway Labor Act, as justification for making moot a suit to compel bargaining with the labor organization freely chosen by his employees to represent them, set up the loss of a majority or the dissolution of that labor organization which the employer induced by conduct violating the Act?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set out in Appendix B, p. 32, infra.

STATEMENT[1]

Petitioner (CAL Chapter) is a labor organization which bargained for many years with respondent Continental Air Lines, Inc. (Continental) on behalf of its members, the flight engineers employed by Continental.[2] Respondent Air Line Pilots Association (ALPA) is a labor organization which has represented the pilots employed by Continental.

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[1] References designated "R" are to the Transcript of Record in the Court below, which is on file with the Clerk of this Court.

[2] In 1953 CAL Chapter filed an application for certification by the National Mediation Board under the Railway Labor Act. However, no election was held and no certification issued because Continental notified CAL Chapter that it would voluntarily extend recognition since it agreed that CAL Chapter had been designated by a majority of the flight engineers. On that basis, the National Mediation Board closed its files in the representation case. (R. 30, 103.)

On May 29, 1959, during the life of a collective bargaining agreement with CAL Chapter covering all flight engineers in its employ, Continental entered into an agreement with ALPA establishing terms and conditions of employment for flight engineers assigned to turbo-jet aircraft different from those provided in the existing agreement with CAL Chapter.[3] In essence, this agreement, which was to go into effect upon the expiration of the then-existing agreement with CAL Chapter, changed the job title of the turbo-jet flight engineer to "Second Officer," and provided that Continental would recognize ALPA, instead of CAL Chapter, as the collective bargaining representative of the turbo-jet flight engineers, that the rates of pay, rules, and working conditions for that flight engineer job would be established under the ALPA agreement, and that personnel assigned to that flight engineer job would be assigned from the ALPA seniority list, instead of from the seniority list established under the CAL Chapter agreement. (R. 6-7, 34-36.)

CAL Chapter was not a party to, or advised of, the negotiations between Continental and ALPA which produced that agreement of May 29, 1959, and it was not consulted with respect to that agreement, despite the fact that said agreement covered matters with respect to which CAL Chapter was the exclusive bargaining representative. (R. 6-7, 36.) Nor was there any proceeding instituted by ALPA under the Railway Labor Act to determine whether any flight engineers in the employ of Continental desired a change in their bargaining representative. (R. 33.)

In the months that followed, Continental embarked upon a course of conduct designed to implement this agreement and to remove CAL Chapter as the representative of the flight engineers assigned to turbo-jet aircraft. This course of conduct included: (1) An attempt to solicit the individ-

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[3] Continental began its operation of turbo-jet aircraft on June 1, 1959. (R. 95.) Its then-existing collective bargaining agreement with CAL Chapter specifically covered flight engineers assigned to such aircraft. (R. 5, 209-210, 281-282, 326-328.)

ual flight engineers in order to persuade them to place their names on the ALPA seniority list and to agree that the flight engineers assigned to turbo-jets would be covered by the ALPA agreement. (R. 7-8, 37-38); (2) An attempt to negotiate a new agreement with CAL Chapter which would eliminate all of the existing references to turbo-jet flight engineers and would no longer be applicable to such personnel. (R. 8, 38-39); (3) A flat refusal to continue to recognize and bargain with CAL Chapter with respect to any matters affecting flight engineers assigned to turbo-jet aircraft, giving as its reason the fact that "The Company has a valid contract dated May 29, 1959, with the pilots which it must honor." (R. 8-9, 39, 42-49, 285); (4) The announcement of a "lockout" ultimatum to the effect that beginning on May 28, 1960, flight engineers would not be permitted to continue to work on turbo-jet aircraft unless they agreed to be placed on the ALPA seniority list and to be represented by ALPA instead of CAL Chapter. (R. 9-10, 214); and (5) The execution of further amendments to the agreement with ALPA—again without any consultation with CAL Chapter—providing, *inter alia*, for pay increases for those flight engineers who yielded to the ultimatum and elected to work as turbo-jet engineers under the ALPA agreement. (R. 87, 101, 215-216.)

The instant suit was instituted in the United States District Court for the Southern District of California on June 1, 1960. (R. 15.) In this suit CAL Chapter seeks a declaration that the agreement of May 29, 1959 was in violation of the Railway Labor Act insofar as it had the intent and subsequent effect of depriving flight engineers in the employ of Continental of their right to select their own collective bargaining representative, and of causing Continental to refuse to bargain with CAL Chapter for all of the craft or class represented by that Union. It seeks to enjoin ALPA and Continental from implementing that agreement which culminated in the lockout of the flight engineers on May 28, 1960, and from entering into similar agreements in the future which likewise recognize ALPA instead of CAL

Chapter as the exclusive representative of flight engineers. It seeks an order compelling Continental to restore the flight engineers to their positions, to resume recognition of CAL Chapter for all of its flight engineers, and to bargain collectively with CAL Chapter with respect to all of its flight engineers. (R. 12-15.)

On July 13, 1960, the District Court denied the motion of CAL Chapter for a preliminary injunction on grounds (R. 299-305) that are not germaine to the instant petition since they were not relied upon by the Court below.

In due course, CAL Chapter filed an appeal in the Court below. Meanwhile, beginning on or about June 30, 1960 the flight engineers in the employ of Continental struck in protest against the aforementioned lockout and against the unlawful refusal of Continental to continue to deal with CAL Chapter as the exclusive bargaining representative of its flight engineers.[4] During the course of the strike Continental advised CAL Chapter that the employment status of all the strikers had been terminated and that, as a result, Continental would no longer recognize CAL Chapter as the representative of any of its employees. CAL Chapter replied refusing to recognize the validity of the discharges or of the refusal to deal with the Union representing the striking flight engineers.

However, on or about October 10, 1960, while the appeal in the instant case was pending in the Court below, Continental, with the aid of ALPA, took the final step in its campaign to destroy CAL Chapter. Continental entered into an agreement with ALPA and some of the *individual striking flight engineers*[5]—an agreement to which CAL Chapter is *not* a party—terminating the strike on certain conditions including the condition that the CAL Chapter would be dissolved, and replaced by ALPA as the bargain-

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[4] The pertinent facts concerning the events following the strike of June 30, 1960 which are summarized above are set forth in the affidavit of Glenn B. Iverson attached to the "Opposition of Appellant To Motions of Appellees To Dismiss Appeal" which is on file with the Clerk of this Court.

[5] As the Court below correctly observed, "Whether it was signed by all of them is in dispute." (See *infra* Appendix A, p. 25.)

ing representative, and the condition that the strikers would select one of three "options" each of which involved an *individual* agreement either to return to work and receive certain guarantees which could involve as much as $20,000 in a lump sum payment, or not return to work and receive "severance pay" of $10,000.[6] Steps were taken by certain of the members of CAL Chapter who favored this proposal with a view to dissolving the CAL Chapter; but petitioner has maintained, and continues to maintain, that: (1) the attempted dissolution was invalid, and (2) a valid trusteeship over its CAL Chapter was established by the Flight Engineers' International Association for the purpose, *inter alia*, of continuing the prosecution of this suit and thereby vindicating the rights under the Railway Labor Act which the conduct of Continental and ALPA have destroyed.[7] Faced with no reasonable alternative, the individual strikers each succumbed to the monetary lure and signed one or another the options. Obviously, however, none of them had the authority by his individual agreement to waive the statutory right of CAL Chapter to insist that Continental bargain with CAL Chapter and refrain from conduct designed to force ALPA upon the flight engineers.

After the occurrence of the facts just mentioned, respondents moved in the Court below to dismiss the appeal for mootness, on the assertions that: (1) CAL Chapter is no longer in existence, (2) the dispute involved in the lawsuit

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[6] A copy of this agreement appears as Exhibit 5 to the affidavit of Roy A. Berry attached to the "Motion To Dismiss By Appellee Air Line Pilots Association, International, AFL-CIO" in the Court below which is on file with the Clerk of this Court.

[7] In its opinion the Court below considers and rules upon the question of whether the dissolution of the CAL Chapter was effective and proper and the question of whether the trusteeship was timely and lawful. For the reasons discussed below in this petition, it is not necessary for this Court to resolve those questions, and this petition does not seek to place in issue the merits of the decision of the Court below on those questions. The ultimate decision of the Court below dismissing the appeal as moot cannot be sustained even if it be assumed, *arguendo*, that CAL Chapter was dissolved in accordance with proper procedure and all necessary votes under the union's by-laws, and even if no trusteeship had thereafter been established.

has been settled, and (3) CAL Chapter represents no present employees of Continental and any former employees it purports to represent have accepted termination pay and are now estopped to claim a right of employment.

The Court below dismissed the appeal, and remanded the case with instructions to dismiss the case. It found that the case is moot because CAL Chapter has been dissolved and therefore "the sole plaintiff and appellant no longer exists." Without discussion, it also accepted the two additional reasons on the basis of which respondents had urged mootness, namely that the dispute has been settled, and that CAL Chapter no longer is a majority representative of any Continental employees. (Appendix A, *infra*, p. 30.)

It is from this decision that petitioner appeals to this Court.

REASONS FOR GRANTING THE WRIT

Several of the reasons for which this Court will normally grant review of decisions of U. S. Courts of Appeals combine to justify granting the writ sought in the instant case. The issue is of major importance in the administration of the Railway Labor Act; and the decision of the Court below is contrary to precedent established by this Court, and in conflict with decisions by other U. S. Courts of Appeals.

Consider the nature of this case in its essential outline: At a time when CAL Chapter is the duly designated and recognized majority representative of all of the flight engineers in the employ of Continental, a carrier subject to the Railway Labor Act, Continental embarks upon a program, the necessary and intended effect of which is to supplant CAL Chapter as the bargaining representative of a part of the craft or class it has theretofore represented, and to compel the employees involved to accept representation by ALPA. To achieve that end, Continental deals with ALPA on matters with respect to which it is required to deal with CAL Chapter, engages in individual bargaining with flight engineers in an effort to persuade them to

go along with the arrangement Continental has made with ALPA, refuses to continue to recognize and negotiate with CAL Chapter on matters with respect to which CAL Chapter is the only authorized reprensentative, locks out those flight engineers who refuse to accept Continental's ultimatum to accept ALPA representation and the ALPA contract or get out, and grants wage increases to those who do accept this ultimatum. CAL Chapter brings suit in a federal Court seeking to restrain and set aside this conduct, charging—with such obvious justification—that this conduct is in violation of the Railway Labor Act. But, before any court can determine the merits of this charge, Continental succeeds—again by negotiating with individual flight engineers in derogation of the rights of CAL Chapter and of those it represented—in getting some of the flight engineers individually to renounce CAL Chapter, to agree to terminate the litigation, and to take steps in an effort to dissolve that union. Believing that it has now successfully completed the process of destroying CAL Chapter, Continental and its co-conspirator ALPA, then urge that the litigation initiated by CAL Chapter has been rendered moot because, as Continental and ALPA claim, CAL Chapter no longer represents anyone, indeed no longer exists, and the dispute has been settled. The Court below accepts this contention concerning itself only with the irrelevant issues of whether in fact CAL Chapter was dissolved in accordance with the by-laws of the Union, and whether any entity survived to prosecute its suit, and ignoring completely the relevant issue of whether, assuming CAL Chapter was dissolved, the dissolution is attributable to conduct of Continental in violation of the Railway Labor Act, and the related relevant issue of whether, in any event, it is necessary that the suit be held to survive the alleged dissolution in order to remedy the unlawful conduct committed and complained of before the alleged dissolution occurred.

Sections 2, Third, 2, Fourth, and 2, Ninth of the Railway Labor Act (App. B, *infra*, pp. 32, 33) grants to the employees of a carrier subject to the Act the right to select their rep-

resentatives for collective bargaining without interference or coercion by the carrier, and imposes upon the carrier the duty to refrain from individual bargaining and to bargain exclusively with the labor organization freely selected by the employees in a particular craft or class. In *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937), this Court interpreted the relevant sections of the Act in these terms:

> "The obligation imposed on the employer by section 2, Ninth (45 U.S.C.A. § 152, subd. 9), to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the act, and of the provisions of section 2, Third and Fourth (45 U.S.C. A. § 152, subs. 3, 4), giving the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

The specific conduct of engaging in bargaining with the individual employees at a time when they have designated a collective bargaining representative—conduct which is at the heart of the process by which Continental attempted to destroy CAL Chapter—was declared unlawful under the Railway Labor Act in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). In reaching the conclusion that individual bargaining is the very antithesis of the kind of collective bargaining the Act commands, this Court specifically cited and relied upon its decision in *J. I. Case Company* v. *N. L. R. B.*, 321 U.S. 332 (1944), where the same conclusion was found applicable to the National Labor Relations Act, 29 U.S.C. § 141 et seq. In that case this Court said:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, *nor to exclude the contracting employee from a duly ascer-*

> *tained bargaining unit;* nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement." (321 U.S. at 337 [Emphasis added].)
>
> See also: *Steele* v. *Louisville & Nashville R. R.*, 321 U.S. 192, 200 (1944).

There can be no doubt that the kind of conduct of which Continental is charged in this suit—i.e., the refusal to continue to recognize the majority representative of the flight engineers, the attempt to coerce the flight engineers into changing representatives, and the individual negotiation with flight engineers—is clearly proscribed by the Railway Labor Act. Moreover, this Court has made it plain that it is within the power of the federal courts, in a suit such as the instant one, to enforce by appropriate decree these mandates and prohibitions of the Act. That is the central lesson of *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), and *Virginian Ry.* v. *System Federation, supra.* In the latter case this Court said:

> "There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent." (300 U.S. at 550.)

What is more—and we now touch directly on considerations pertinent to the issue of mootness—this Court has pointed out that in the enforcement of the obligations of a carrier under the Railway Labor Act the federal courts are dealing *with the public interest* and not with private rights, and that as a consequence the tests of when a court will or will not grant relief must be different from what obtains when the enforcement of private rights are involved. Thus in *Virginian Ry.* v. *System Federation, supra*, this Court said:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor contro-

versies, especially where they may seriously impair the ability of an interstate rail carrier to perform its services to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. *Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.*" (300 U.S. at 552 [Emphasis added].)

When a federal court enforces, by an equitable decree, the obligations and proscriptions of the Railway Labor Act, it acts in the same capacity as the National Labor Relations Board under the National Labor Relations Act. As to the public interest involved, and in particular as to the fact that such public interest supersedes even the desire of the individual employees to waive their rights, this Court has said in *National Licorice Company* v. *N. L. R. B.*, 309 U.S. 350 (1940), in words that are particularly cogent here:

> "The Board Acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self organization, and designation of representatives of *their own choosing for the purpose of* negotiating the terms and conditions of their employment * * *' § 1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by § 7, 8 are practices tending to thwart the declared policy of the Act."
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> * * * * * *
>
> "Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, *but to the prevention of his enjoyment of any advantage which*

> *he has gained by violation of the Act*, whether it be a company union *or an unlawful contract with employees* as the means of defeating the statutory policy and purpose. *Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights.*" (309 U.S. at 362-364 [Emphasis added].)

The instant suit, therefore, was brought to vindicate the public interest, embodied in the Railway Labor Act, in promoting collective bargaining, and in preventing carriers from interfering in the free choice of representatives of their employees for collective bargaining. As in *National Licorice*, the suit was aimed at preventing the violations from continuing and at preventing Continental from the "enjoyment of any advantage which [it] has gained by violation of the Act." The Court below wholly ignored the public interest aspect of this litigation in ruling that the suit had become moot as a result of the unlawful agreements between Continental and the individual flight engineers.

Yet, this Court has, on more than one occasion, ruled that litigation which involves a matter of the public interest must be permitted to survive developments during the course of the litigation which would have resulted in rendering moot a case where only private rights are involved. In the leading case of *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897), this Court enunciated that rule in these terms:

> "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the Court being informed of the facts will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public the enforcement of which the Government

> has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose these rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the Act of Congress, by any such action as has been taken in this case."[8]

See also: *Southern Pacific Terminal Company* v. *I. C. C.*, 219 U.S. 498 (1911).

In *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944), this Court dealt with the contention that an appeal in a suit to restrain alleged violations of the Fair Labor Standards Act had become moot because the corporate defendant had been dissolved. This Court rejected the mootness contention, stating that "In the present posture of the case we think it plain that the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant." (321 U.S. 671 at 673.) This Court cited the *Trans-Missouri* and *Southern Pacific* decision, *supra*, and after referring to numerous decisions in which litigation has been held to survive the dissolution of a corporate defendant, this Court said:

> "And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interests were involved. See *Virginian R. Co.* v. *System Federation*, 300 U.S. 515, 552, 57 S. Ct. 592, 601, 81 L. Ed. 789, and cases cited."

See also: *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938). *Fishgold* v. *Sullivan Dry Dock & Repairs Corp.*, 328 U.S. 725 (1946).

We submit, therefore, that the decision of the Court below, in declaring the instant litigation moot, ignored the indisputable fact that the suit involves matters of public,

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[8] Suppose that instead of bringing a civil suit, CAL Chapter had elected to file criminal charges under Section 2, Tenth of the Act, and a U. S. Attorney had instituted criminal proceedings. Under the authority of the *Trans-Missouri* decision it can hardly be doubted that such proceedings would *not* have been ruled moot on the facts of this case. No different result can obtain here, for, as shown above, the same public rights are involved here.

and not private, interest which must be resolved irrespective of what has happened to the union plaintiff. In that respect, if in no other, the decision below conflicts with the decisions of this Court and must be reversed.

But, important as it is, this general principle is by no means the sole consideration which justifies review by this Court of the decision below. There is an even more direct and specific respect in which the decision below cannot be squared with the rulings of this Court and of other federal courts.

Ever since the time when Congress first established, in the Railway Labor Act and in the National Labor Relations Act, the employer's obligation to bargain collectively—an obligation enforceable through administrative and/or judicial proceedings—this question has presented itself: Suppose that after an employer has refused to bargain, a majority of the employees renounce the Union, will this loss of majority support by the Union render it unnecessary or improper to issue an order compelling collective bargaining, or render proceedings to obtain such an order moot? There is no question but that this Court has answered that question in the negative, particularly where—as in the instant case—the loss of majority can be attributed to the employer's unlawful conduct.

One of the early cases in which this problem arose was *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks, supra.* There this Court enforced a district court order compelling the carrier to bargain with the duly designated union despite the fact that while the proceedings were pending the carrier had succeeded in coercing a majority of the employees to withdraw from that union and to select another union as their representative.

The most definitive statement of the views of this Court on that question appear in *Medo Photo Supply Co.* v. *N. L. R. B.*, 321 U.S. 678 (1944), where the employer sought to avoid the sanctions imposed by the Board against his refusal to bargain on the ground: (1) that the complaining union no longer had the support of a majority of the em-

ployees involved, and (2) that unfair labor practices were condoned by the employees themselves. This Court rejected those contentions in these terms:

> "Petitioner was not relieved from its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, • • • or the employees suggest the conduct found to be an unfair labor practice • • • at least where the employer is in a position to secure any advantage from these practices, • • •.
>
> "Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. • • • Petitioner's refusal to bargain under those circumstances was but an aggrevation of its unfair labor practice in destroying the majority's support of the union, and was a violation of § 8 (1) and (5) of the Act." (Citations omitted.) 321, U.S. at 687.

In *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U.S. 318 (1940), this Court was likewise confronted with the claim of an employer that no order to bargain should issue because there had been a defection of members from the charging union. In terms directly applicable here, this Court said:

> "Respondent has contended before the Board, as here, that if the T. W. O. C. did actually represent a majority of its employees on April 4 (as the Board found), a shift in membership had given the Federation a majority when the company on April 9 recognized it as exclusive bargaining representative. However, the Board found that 'the record is clear that, had it not been for the unfair labor practices of the respondent in organizing and fostering the Federation and in persuading, intimidating and coercing

its employees to join the Federation and leave the T. W. O. C., the respondent's employees would have remained members of the T. W. O. C.' In view of the substantial support in the evidence for the Board's findings that the company intimidated and coerced its employees and dominated the Federation, the Board properly concluded that 'The unfair labor practices of the respondent cannot operate to change the bargaining representative previously selected by the untrammelled will of the majority'." (Footnote omitted.) 310 U.S. at 339-340.

See also: *National Licorice Co.* v. *N. L. R. B., supra. Franks Bros. Co.* v. *N. L. R. B.*, 321 U.S. 702 (1944). *International Assn. of Machinists* v. *N. L. R. B.*, 311 U.S. 72 (1940). *N. L. R. B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563. (1950)

The Courts of Appeals and the National Labor Relations Board have uniformly followed the principle that an order remedying unfair labor practices proscribed by the Act may not be denied because of the claim that the charging union no longer represents the employees in question. See, e.g.:

Semi-Steel Casting Co. v. *N.L.R.B.*, 160 F (2d) 388. (CA8, 1947). *N.L.R.B.* v. *Swift & Co.*, 162 F (2d) 575 (CA3, 1947). *N.L.R.B.* v. *Norfolk Shipbuilding Co.*, 172 F (2d) 813 (CA4, 1949). *N.L.R.B.* v. *Tower Hosiery Mills*, 180 F (2d) 701 (CA4, 1950). *West Texas Utilities Co.* v. *N.L.R.B.*, 184 F (2d) 233, (CA DC, 1950). *N.L.R.B.* v. *Lambert et al.*, 211 F (2d) 91, (CA5, 1954). *N.L.R.B.* v. *Philamon Laboratories, Inc.*,—F (2d)—, 49 LRRM 2624, (CA2, 1962). *Kohler Co.*, 128 NLRB 1062. *Automotive Supply Co., Inc.*, 119 NLRB 1074.

Surprisingly, the Court below has itself in the past recognized and adhered to this principle. In *N. L. R. B.* v. *Idaho Egg Producers, Inc.*, 229 F (2d) 821 (CA9 1956), the Court stated:

"Moreover an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which if had itself induced by unfair labor practices, even though the

consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding the union does not presently have a majority. *N. L. R. B.* v. *Parma Water Lifter Co.*, 9 Cir., 211 F (2d) 258." (229 F (2d) 821, at 823.)

The decision of the Court below cannot be reconciled with the rulings of this Court and the other authorities cited above. That decision permits a carrier to escape judicial consideration of the legality of a course of conduct aimed at destroying CAL Chapter on the ground that Continental succeeded in accomplishing the destruction before the Court had an opportunity to rule upon the charges. It is a conclusion that flies in the face of the authorities reviewed above, and that violates every sense of justice and equity.

It is true that in most cases where the question has arisen in the past, the defection from the union on which the employer sought to rely to escape an order compelling bargaining took the form of a loss of majority—the members renouncing their adherence to the charging union, or joining another union. Rarely have the reported cases on this question involved a situation in which the charging union went out of existence. Obviously, however, if anything, such a case, *a fortiori*, requires the same result as in the cases reviewed above. And in the two reported cases where such a factual situation is revealed that is precisely the result that was reached. In *Tennessee Valley Broadcasting Company*, 83 N.L.R.B. 895, the charging union was disbanded before the Board could rule on the charge of an unlawful refusal to bargain. The Board, in issuing an order to bargain, said:

> "Nor is the fact that the Union has ceased to exist any impediment to the issuance of an order requiring the Respondent to bargain with the Union on request. Under the circumstances of this case, the disintegration of the Union must be attributed to the Respondent's own unfair labor practices, especially to its persistent refusal to recognize the Union's existence or to bargain with it. It would not effectuate the

policies of the Act to permit the respondent to take advantage of its own illegal acts.[11] "

[11] See *N. L. R. B.* v. *Blanton Co.*, 121 F (2d) 564 (C.A. 8); see also *Franks Bros. Co.* v. *N. L. R. B.*, 321 U.S. 702; *N. L. R. B.* v. *P. Lorillard Co.*; 314 *U.S.* 512; *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U.S. 318." (83 N.L.R.B. 895 at 899.)

N. L. R. B. v. *Blanton Co.*, 121 F (2d) 564 (CA 8, 1941), likewise involved a claim that the charging union was no longer in existence. After considering the question of whether the claimed non-existence was founded in fact, the Court said:

> "But, even more than all this, the record seems to us clearly to justify the finding that the dazed condition of the union had been occasioned by the persistent undermining efforts of the employer, as we shall discuss later. Any change in its status from such a cause was not one to which the Board was required to give recognition in favor of respondent. • • • We hold that the Board could properly find that the union was such an existent labor organization as to entitle it to file charges under the Act." (121 F (2d) 564 at 569. (Citations omitted.)

In the instant case, the alleged dissolution of the CAL Chapter may not only be attributed to Continental's refusal to bargain with it and Continental's insistence on dealing with ALPA, but also, and even more immediately, to the contracts with the individual flight engineers which Continental obtained at the termination of the strike. Such conduct, as we have seen above, is itself violative of the Railway Labor Act. To hold that by that process Continental succeeded in making this suit moot is unconscionable and in conflict with all of the precedents discussed above.

For the reasons already discussed, the decision of the Court below must fall, irrespective of whether it is wrong or right on the question of whether a legally effective dissolution of CAL Chapter was accomplished. Some brief comment on the Court's findings on that question is in order, however, because those findings themselves emphasize by

how far the Court below missed the central issue in the case, and ignored the applicable precedents of this Court.

The conclusion of the Court below that the dissolution was validly accomplished rests itself only on the minutes of a meeting as to which the Court below said pointedly "disputed questions of fact concerning that meeting are presented which *cannot be determined* on the record before us" (Appendix A, *infra*, p. 24.) [Emphasis supplied.] The Court seeks to set at rest these disputed questions of fact by finding that any initial invalidity was cured by "unanimous ratification" of dissolution by acceptance of certain options in accordance with the settlement agreement, despite the fact that the Court earlier found "whether it was actually signed by all of them is in dispute." (Appendix A, *infra*, p. 25.) Most startling is the citation of *Harker* v. *McKissock*, N.J. Sup. Ct., 81 A (2d) 480, in support of the principle of ratification. That case, indeed, stands squarely opposed to the principle here enunciated. As is apparent from the more comprehensive factual statement in the opinion of the lower court in that case, ratification was accomplished formally at a meeting announced and held for the stated purpose, "to discuss and by appropriate action to reaffirm the disaffiliation." 62 A (2d) 405, 27 LRRM 2040. That court relied, properly, on the principle that an *assembly* may ratify any action which it has the power to authorize in advance, in which case the ratification relates back to the date of the action ratified. In direct contrast stand the facts of the case at bar, in which the only possible source of ratification is not the assembly at all—but rather, the individual flight engineers with whom the employer dealt individually in direct violation of the letter and spirit of the Railway Labor Act.

Thus, in every respect, the Court below missed the mark completely. The Railway Labor Act requires collective bargaining, prohibits direct dealing with individual employees, and insists that employees be free from employer interference in their selection of bargaining representatives. A suit in a federal court seeking to enjoin violations

of the Act involving a refusal to bargain, individual bargaining and coercion by an employer in the employees' selection of a union cannot be deemed moot when the employer succeeds—through further violations—in destroying the union completely. Such a result makes meaningless the precedents of this Court reviewed above; it involves a question of singular importance in the administration of the Act and it cannot be permitted to stand.

CONCLUSION

For all of the reasons stated above, petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Court below in this cause.

Respectfully submitted,

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MARCH 27, 1962.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17,071—Oct. 23, 1961

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, AN UNINCORPORATED ASSOCIATION, APPELLANT,

vs.

CONTINENTAL AIR LINES, INC., A NEVADA CORPORATION; AND THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, AN UNINCORPORATED ASSOCIATION, APPELLEES.

Appeal from the United States District Court for the Southern District of California, Central Division

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Before: HAMLEY, JERTBERG and MERRILL, *Circuit Judges.*

HAMLEY, *Circuit Judge:* In this action Flight Engineers International Association, AFL-CIO, CAL Chapter, (CAL Chapter) sought a declaratory judgment and injunctive relief against Continental Air Lines, Inc., (Continental) and The Air Line Pilots Association, International, AFL-CIO, (ALPA).[1] The action arose under the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, and the district court had jurisdiction under 28 U.S.C.A. §§ 1331, 1337.

Plaintiff sought a judgment declaring that a contract entered into between Continental and ALPA on May 29, 1959, is void and unenforceable to the extent that it purports to apply to rates of pay, rules or working conditions of persons performing the duties of flight engineers, however described. It sought a preliminary and permanent injunction enjoining defendants from giving effect to the

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1 The letters "CAL" in the name of plaintiff are used to indicate "Continental Air Lines."

May 29, 1959 contract, or any renewal, modification or extension thereof, or any similar agreement, so as to affect the rates of pay, rules, working conditions, job assignments, seniority or other conditions of employment of persons performing the flight engineering function employed or to be employed by Continental.[2]

The suit was filed on June 1, 1960. On the following day plaintiff moved for a preliminary injunction in accordance with the prayer of its complaint. A district court hearing was held thereon on June 14, 1960, at which time affidavits and briefs were received and oral argument was had, no evidence being offered. An order, supported by findings of fact and conclusions of law, was entered on July 11, 1960, denying the motion for a preliminary injunction. Plaintiff appeals. We have jurisdiction under 28 U.S.C.A. § 1292 (a)(1).

On June 21, 1961, while the appeal was pending in this court and prior to oral argument therein, Continental moved for dismissal of the appeal for mootness. A similar motion was filed on the same day by ALPA. The motions were opposed by appellant and we heard oral argument thereon at the same time that the appeal was argued on the merits.

Several grounds are advanced by Continental and ALPA why the appeal and the case should be dismissed as moot.

[2] The injunction sought would also (1) restrain any change in the manner of assigning persons to perform the duties of flight engineers as such assignments were made prior to May 29, 1960, except changes made as a result of collective bargaining between Continental and CAL Chapter; (2) restrain interference with any of the employees of Continental in the designation of a collective bargaining agent; (3) restrain defendants from dealing with each other as representatives of flight engineers however described; (4) restrain Continental from refusing to recognize CAL Chapter as the exclusive bargaining representative of persons performing duties of flight engineers; (5) restrain defendants from putting into effect any change in rates of pay, rules or working conditions of employees performing duties of flight engineers unless and until Continental should give the written notice and observe other conditions contained in § 6 of the Railway Labor Act, 45 U.S.C.A. § 156; (6) require Continental to restore to their jobs without loss of seniority or other rights all flight engineers employed by Continental on May 29, 1960; and (7) require Continental to recognize and deal with CAL Chapter as the exclusive representative of all persons employed by the company who were performing the function of flight engineer; however described.

Among these are the following: (1) CAL Chapter, the sole plaintiff and appellant, is no longer in existence; (2) the dispute involved in the lawsuit has been settled; and (3) CAL Chapter represents no present employees of Continental and any former employees whom it purports to represent have accepted termination pay and are now estopped to claim a right of employment.

Pertinent to these grounds for dismissal the affidavits of record establish facts which we now summarize. At the time the suit was commenced on June 1, 1960, CAL Chapter, the sole plaintiff and appellant, was an unincorporated association functioning as a labor organization. As an affiliated local chapter of Flight Engineers International Association, AFL-CIO (International), it then represented flight engineers employed by Continental. At that time, however, there was no collective bargaining agreement in effect between CAL Chapter and Continental. The agreement between them had expired on May 1, 1960, when the parties were unable to agree upon cross-proposals for changes therein as proposed in their respective reopening notices served in accordance with 45 U.S.C.A. § 156.

On June 30, 1960, while this case was pending in the district court, CAL Chapter called and commenced a strike against Continental. Twenty-two of the flight engineers employed by Continental, constituting what is conceded to be the complete membership of CAL Chapter, participated in the strike. All twenty-two of the strikers were replaced by Continental, their employment with Continental being thereby terminated. In view of these circumstances Continental on August 27, 1960, notified CAL Chapter that it no longer recognized that union as the bargaining agent for any of Continental's employees.

While the strike was in progress several of the striking flight engineers entered into negotiations with representatives of ALPA regarding ways and means of ending the strike and merging the flight engineers into ALPA, which union would then represent all Continental flight deck crew members.

A tentative agreement was formulated after which a meeting of CAL Chapter was held on October 7, 1960. After accepting the resignation of G. B. Iverson as president of the organization, the meeting adjourned to a later hour the same day, such adjourned meeting to be held at a different place. At the reconvened meeting a motion was made that CAL Chapter be dissolved in accordance with article I, section V, of its constitution and by-laws, and that all strike activities be ended and the flight engineers be merged with ALPA. According to the minutes of the meeting, the motion carried by a vote of fifteen for and one abstaining.

Article I, section V, of the constitution of CAL Chapter provided that a two-thirds majority of the active members was required for dissolution. There being twenty-two such members, fifteen votes were required to dissolve. One of these fifteen votes, however, was that of M. L. Kenyon which was voted by a proxy given to F. L. San Juan.

CAL Chapter contends that this proxy was illegally voted for the reason that Kenyon had not given San Juan his proxy for the purpose of voting for dissolution of the chapter. CAL Chapter also contends that the vote to dissolve was invalid for the additional reason that notice was not given of the meeting at which such vote was had. Continental and ALPA have submitted counter affidavits as to each of these matters, but disputed questions of fact concerning that meeting are presented which cannot be determined on the record before us.

By the same vote as on the motion for dissolution a motion was passed directing the acting president to notify International, National Mediation Board, ALPA, Continental, legal firms retained on behalf of CAL Chapter both past and present, and other interested parties, of the dissolution of CAL Chapter and the other action described above. Under this motion all parties so notified were to be "relieved and/or directed to terminate all efforts or actions relative to CAL Chapter." A second reconvened meeting was held on the night of October 7, 1960, at which

a motion was carried directing the officers of CAL Chapter to act as trustees, as set forth in the constitution, "for the disposal of assets, payment of bills, etc." This motion was carried unanimously, fourteen members being present in person and one by proxy.

In accordance with the action taken at the first reconvened meeting of October 7, 1960, notice was given on that day to the attorneys of CAL Chapter that all differences between it, Continental, and ALPA had been completely resolved and that the strike against Continental had been terminated. These attorneys were also instructed to enter into stipulations with counsel for Continental and ALPA to dismiss or otherwise dispose of all pending litigation, which would include the instant case. These attorneys, however, took no action to dismiss such litigation.

A strike settlement agreement based on the tentative agreement previously reached was prepared and executed by ALPA and some of the twenty-two striking flight engineers. Whether it was actually signed by all of them is in dispute. This agreement was then presented to and executed by Continental on October 10, 1960. Pursuant to this agreement, and between October 7 and 10, 1960, seven former flight engineers elected option (c) in section 1 of this agreement under which they elected not to return to work and were paid severance pay in the amount of $10,000 each. These payments were made and accepted. During the same period the remaining fifteen former flight engineers elected option (b) in section 1 of this agreement under which they were re-employed by Continental as pilots.[3] The

[3] While several of the striking flight engineers now deny that they signed the supplemental agreement or authorized anyone to sign for them, no one denies that he signed a (b) or (c) option. None of those who signed a (c) option and pursuant thereto received severance pay in the sum of $10,000 has indicated any desire to revoke his selection of that option or has made any offer of restitution. In the affidavit of former flight engineer Glenn B. Iverson, however, it is stated: "I do not consider it [the signed option (c)] binding upon me or dispositive of my rights against Continental. By signing option (c) I did not intend to waive my rights to reinstatement to my former position with Continental under terms and conditions of employment negotiated by the CAL Chapter. . . ."

latter returned to work about October 11, 1960, and have continued to work for the company since that time.

The "selection of option" form signed by all twenty-two contains the statement: "The undersigned being . . . a signator to the Supplemental Agreement between Continental Air Lines, Inc., and ALPA dated October 10, 1960. . . .". That supplemental agreement expressly recites that CAL Chapter has been dissolved and that they have terminated the strike and have taken steps to terminate all outstanding litigation between CAL Chapter and Continental.

ALPA and Continental subsequently entered into collective bargaining negotiations which resulted in a new collective bargaining agreement between them dated February 28, 1961. This agreement, which will remain in effect until August 31, 1962, covers all of Continental's flight deck crew members. The ALPA-Continental agreement of May 29, 1959, has expired and is no longer in effect.

In the meantime, on October 10, 1960, the Master Executive Committee of International announced the establishment of a trusteeship over CAL Chapter and notified all CAL Chapter members of this action. In this notice it was stated that the attempt to dissolve CAL Chapter, terminate the litigation against Continental, and to end the strike was in violation of the constitution and by-laws of CAL Chapter and International. International later notified all CAL Chapter members of a hearing in New York City on November 16, 1960, to be held on the question of the establishment of the trusteeship.

Prior to November 16, 1960, the constitution and by-laws of International contained no provision relating to the establishment of a trusteeship over a subordinate body thereof. On that date, however, the Master Executive Board of International amended the constitution of International by adding a new section 16 to article V thereof, providing in detail for the establishment of trusteeships under stated circumstances.

The hearing referred to above was held as scheduled, and on January 4, 1961, the hearing committee issued its

report approving the trusteeship and recommending that it be continued. The hearing committee also recommended that the trustees be instructed to continue to prosecute all pending litigation on behalf of CAL Chapter. Pursuant to the procedures set out in the newly-added constitutional provision respecting trusteeships the recommendations of the hearing committee were approved by the Master Executive Board on March 21, 1961.[4]

With these facts before us we turn to a consideration of the first ground advanced by appellees why this appeal and this case must be deemed moot. This ground is that plaintiff and appellant, CAL Chapter, is no longer in existence. If this is true the appeal and case is necessarily moot, since there would no longer be a "case or controversy" within the meaning of Article III, Section 2 of the Constitution. Federal courts have jurisdiction only where a case or controversy is involved. *Muskrat* v. *United States*, 219 U.S. 346, 356.

According to the minutes of the meeting of CAL Chapter held on October 7, 1960, that chapter was dissolved at that time by the requisite number of votes of the members. The minutes also indicate that a motion was passed by the same vote directing that International be advised of the dissolution. It is undisputed that such notice was given on that date.

The facts just recited establish that CAL Chapter was dissolved on that day unless other facts are properly before us which establish that such dissolution was invalid or ineffective. Facts which assertedly demonstrate the invalidity or ineffectiveness of that dissolution are presented by CAL Chapter acting through trustees appointed under a trusteeship established by International.

But appellees Continental and ALPA contend that the purported trusteeship was not validly established, and since International is not a separate party and has no interest

[4] The trustees of CAL Chapter filed reports with the Commissioner of the Bureau of Labor-Management Reports of the United States Department of Labor, concerning the establishment of the trusteeship on October 10, 1960. On May 9, 1961, the trustees filed a semiannual report with the commissioner.

in this case except as trustee, no question as to the invalidity of the dissolution is properly before us. Appellees point to 29 U.S.C.A. § 462 which provides that trusteeships shall be established and administered by a labor organization over a subordinate body "only in accordance with the constitution and by-laws of the organization which has assumed trusteeship. . . ." Appellees call attention to the fact, conceded by CAL Chapter, that on October 7, 1960, when CAL chapter voted to dissolve, and on October 10, 1960, when International purported to establish a trusteeship, the constitution and by-laws of International contained no provision relating to trusteeships.

CAL Chapter meets this argument by contending that International had the "inherent" right to establish a trusteeship because the attempted dissolution threatened the "natural right of self-preservation" of International. CAL Chapter also argues that, authorized by the amendment to International's constitution made on November 16, 1960, whereby trusteeships were provided for, the Master Executive Board at a later date ratified and continued the trusteeship initially based on inherent right.

Whatever "inherent" power an international union formerly may have had to impose a trusteeship where the international constitution or by-laws made no provision therefor, it has had no such power since the enactment of the Labor-Management Act of 1959, Public Law 86-257; 73 Stat. 531. Section 302 thereof, 29 U.S.C.A. § 462 expressly provides that such trusteeships shall be established and maintained "only in accordance with the constitution and by-laws of the organization which has assumed trusteeship. . . ."

If confirmation is needed of the specific limitation thus intended to be placed upon internationals, it is sufficient to refer to Senate Report No. 187 to accompany S. 1555, which became the Labor-Management Act of 1959. The committee therein stated that it concurred in the select committee's recommendation that there should be a "limitation on the right of internationals to place local unions in trusteeship."

2 U.S. Code Cong. and Ad. News, 86th Cong., 1st Sess., 1959, p. 2333.[5]

If it be assumed, however, that an international has such an "inherent" right notwithstanding section 462, that right could at most be exerted for the purpose of preventing the subordinate body from violating some obligation it had accepted by virtue of its relationship with the international. But on the record before us it is established that in dissolving on October 7, 1960, CAL Chapter violated no such obligation.

The only provision of International's constitution and by-laws concerning the dissolution of chapters is section 4 of article V which provides in part: "No chapter shall be disbanded or withdrawn by its own motion as long as the majority of the members in good standing favor its continuance. . . ." It is undisputed that at the meeting of CAL Chapter held on October 7, 1960, at least fourteen of a total chapter membership of twenty-two voted for dissolution, thus fully meeting the requirement of section 4 of article V of International's constitution.

It may be that CAL Chapter also obligated itself to International to dissolve only in the manner provided in the chapter's constitution and by-laws. In that event consideration should be given to CAL Chapter's contention that one less than the two-thirds vote required by the chapter constitution and by-laws voted for dissolution, and that notice of the meeting at which dissolution was voted was not given in the manner required by the chapter's constitution and by-laws.

But if there was any initial invalidity in this regard the same has been cured by the unanimous ratification of the dissolution evidenced by the acceptance, not later than Oc-

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[5] The Senate committee also said, in analyzing the trusteeship provisions of the act:

"Section 202 [later 302] of the bill sets up two standards for testing the legality of a trusteeship.

First, the trusteeship must 'conform to the constitution and bylaws of the labor organization. . . .'" (2 U.S. Code Cong. and Ad News, 86th Cong., 1st Sess., 1959, p. 2334)

tober 10, 1960, of one or the other of the options offered under the supplemental agreement of October 10, 1960. As before noted, these options contained the recital that the person signing his name is "a signator to the supplemental agreement. . . ." That supplemental agreement expressly recites that CAL Chapter has been dissolved. The described circumstances, considered together, constitute a unanimous ratification of the dissolution proceeding which in our view overcomes any possible question as to the validity of those proceedings. See *Harker* v. *McKissock*, N.J. Sup. Ct., 81 A. 2d 480, 485.

On November 16, 1960, the constitution of International was amended to permit trusteeships. But this newly-added provision was applicable only to chapters in existence on that date. As before noted, CAL Chapter had been dissolved not later than October 10, 1960.

We conclude that International, acting through its purported trusteeship of CAL Chapter, or otherwise, has no standing to question the validity of the dissolution of CAL Chapter. In view of that dissolution, the sole plaintiff and appellant no longer exists.

For the reasons stated, this appeal and case is now moot. We think it is also moot for the two additional reasons urged by appellees as set out earlier in this opinion.

The appeal is dismissed and the case is remanded with directions to dismiss the same.

(Endorsed) Opinion Filed Oct. 23, 1961.

FRANK H. SCHMID, *Clerk*.

The United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17071—Judgment

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, ETC., APPELLANT,

vs.

CONTINENTAL AIR LINES, INC., ET AL., APPELLEES.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motions of appellees to dismiss appeal here herein and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the motions to dismiss in this Cause be, and hereby are granted and that the appeal in this cause be and hereby is dismissed and that the cause is remanded to the said District Court with directions to dismiss the cause, with costs in this court in favor of the appellees and against the appellant.

It is further ordered and adjudged by this Court that the appellees recover against the appellant for their costs herein expended and have execution therefor.

Filed and entered October 23, 1961.

The United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCERPT FROM PROCEEDINGS OF THURSDAY DECEMBER 7, 1961

Before: HAMLEY, JERTBERG and MERRILL, *Circuit Judges*.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed December 4, 1961, and within time allowed therefor by rule of Court, for a rehearing of above cause be and hereby is denied.

APPENDIX B

Pertinent provisions of the Railway Labor Act referred to in the brief are as follows:

Section 2, Third:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from per-

mitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have

power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 6:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."